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IRREGULARITY IN THE HIGH COURT : APPEAL OR REVIEW?

BY

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The difference between appeal and review is familiar to Southern African lawyers: appeal challenges the correctness of the decision and is based on what appears in the record; review challenges the regularity of the proceedings and may be based on matter not appearing in the record but introduced by affidavit. Since the High Court Act, 1964, appeals from magistrates' courts and from the General Division have been heard by the Appellate Division, while the review of proceedings in magistrates' courts has been a matter for the General Division. This is clear enough, but what if an irregularity occurs in the General Division?

There is no clear answer to this question, and the author argues that a clear statutory answer is desirable but in the meantime it would not be improper for the Appellate Division to exercise review jurisdiction over the General Division if the need arose.

There have been several occasions in recent years on which the South African Appellate Division has been obliged to deal with irregularities in the proceedings of Provincial Divisions of the Supreme Court. In all these cases the Appellate Division has entertained the complaint not by way of review but on appeal, and it would seem to be settled in South Africa that this is the correct procedure in cases of this kind.

In *Hamman v. Moolman,* 1968 (4) S.A. 340 D - H the Appellate Division allowed an appeal against the decision of the Cape Provincial Division on the ground that the learned Judge President had virtually taken over from counsel both the examination and cross-examination of witnesses, thus obscuring his objective and dispassionate judgment. Similarly, in *Soloman and Another NN.O v. de Waal,* 1972 (1) S.A. 575, the Judge President harassed counsel to such an extent that, on appeal, Potgieter J. A. found that his conduct might have disabled him from acting with due impartiality. In *S. v. Kellner,* 1963 (2) S.A. 441 the Court set aside a conviction which had followed the Judge President's irregular summing up to his jury.

This line of cases has been extended by two recent decisions. In *S. v. Meyer* 1972 (3) S.A. 480 an appeal against conviction in the magistrate's court was allowed on the ground that the magistrate had failed to maintain an "impeccable impartiality". Furthermore, in *Olivier v. Kaapse Balieraad,* 1972 (3) S.A. 485, the question of the effect of a trial judge's apparent partiality was raised by way of appeal.

It is respectfully submitted that this approach overlooks the well-established distinction between appellate and review proceedings and that the latter are more appropriate where the complaint is that there was an irregularity or illegality in the original poceedings. As Mason J. said in *Ellis v. Morgan, Ellis v. Dessai,* 1909 T.S. 576, 581:

> " . . . an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined".

The meaning of the word "review" was discussed by Innes C.J. in *Johannesburg Consolidated Investments v. Johannesburg Town Council,* 1903 T.S. 111, 114 in the following manner:

> "If we examine the scope of this word as it occurs in our statutes and has been interpreted by our practice, it will be found that the same expression is capable of three distinct and separate meanings. In its first and most usual signification it denotes the process by which, apart from appeal, the proceedings of inferior courts of justice, both civil and criminal, are brought before this court in respect of grave irregularities or illegalities occurring during the course of such proceedings".

But what exactly is the scope of review in this first sense of the word? Is it confined to "inferior courts of justice?"

The South African Supreme Court Act only refers expressly to the review of inferior court proceedings by a Provincial Division. Rose Innes[1] takes the view that

> "there is no procedure other than in the form of an appeal, whereby the proceedings of the Supreme Court may be brought on review. There is no right of review from the decision of a judge of the Supreme Court, either by statute or at common law".

Whether or not this view can be accepted *in toto* is open to some doubt, but it is clear — at least so far as South Africa is concerned — that an irregularity which would otherwise form the basis of review proceedings may constitute a ground of appeal. But what of the position in Rhodesia: in the event of an irregularity occurring in the General Division of the High Court what remedies are available to the aggrieved party?

Firstly an irregularity would presumably constitute a "miscarriage of justice" in terms of section 14 (1) (c) of the High Court Act, and would therefore form a statutory ground of appeal. Yet this falls foul of the distinction

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[1] *Judicial Review of Administrative Tribunals in South Africa,* p.11.

which, it is submitted, should be preserved between appeal and review. For if this distinction is submerged we find ourselves in an anomalous situation : in the High Court all complaints, whether about the method of trial or about the merits of the decision, must take the form of an appeal, whereas, should a complaint of the same nature refer to proceedings before a magistrate, the appropriate remedy may be either appeal or review depending on the precise nature of the complaint. But a plea for the retention of review proceedings in the High Court goes beyond a call for uniform procedure and rests largely on the fact that the basis of a reviewable irregularity may well not appear *ex facie* the record. In such a situation the aggrieved party is remediless if his complaint may only be heard on appeal, but not if he may proceed by way of review. This then, is the second possibility.

The question is therefore whether the Appellate Division is vested with power of review in respect of proceedings in the General Division, either by virtue of some statutory provision or under the common law. The High Court Act states that "the General Division shall have power, jurisdiction and authority to review all proceedings of all inferior courts of justice and tribunals established by law within Rhodesia", but contains no corresponding provision in respect of the powers of the Appellate Division. Accordingly, any such power of review can be vested only by implication or under the common law. This inquiry may be conveniently phrased as three questions:

(a) is the General Division's power of review merely statutory or is it based on some wider common law power?

(b) if there is a common law power of review does it extend beyond the proceedings of inferior courts?

(c) if it does is the Appellate Division entitled to exercise such a power, or has it been excluded by statute?

At the outset it must be recognised that there is no clear answer to any of these three questions, so any submissions can only be tentative. It would seem however, that less obscurity surrounds the first question than the latter two.

In *Johannesburg Consolidated Investments v. Johannesburg Town Council, supra,* Innes C.J. spoke of the right to review public bodies as follows:

> "This is no special machinery created by the Legislature; it is a right inherent in the Court which has jurisdiction to entertain all civil causes and proceedings arising within the Transvaal".

A certain amount of doubt was cast upon this assertion by Mason J. in *Ellis v. Morgan, supra,* at 583, in which he stated that he could not trace the remedy of review to any Roman-Dutch source but that it was similar to the English writ of certiorari. The doubts expressed by Mason J. were not shared

by Murray C.J. In *L. & B. Holdings v. Mashonaland Rent Appeal Board,* 1959 (3) S.A. 466 (S.R.) 468 B the learned Chief Justice spoke of the court's "common law revisionary powers", and of the "indisputable common law power of the High Court (unless specially excluded or modified) to review the proceedings of any public body administrative or semi-judicial . . .". Nathan expresses the same view.[2]

It may be said, however that the power to review public bodies and tribunals is distinct from the power to review proceedings of inferior courts, although the two are usually dealt with as one power. The fundamental difficulty here is that no modern procedure corresponds exactly to what is loosely called its common law "predecessor" and this is more marked with the composition of judicial and administrative bodies than with the powers which they wield. Many statutes have created a body and laid down the procedure it should follow and conferred certain powers on it, but this does not in itself mean that that body is outside the scope of the common law; for example, it may be required to observe the rules of natural justice in all its proceedings. If the General Division has power to review quasi-judicial and administrative proceedings under the common law (as asserted by Murray C.J.) it would seem that this may well include what are today termed "inferior courts". Roman-Dutch law lacked the refinement — albeit a doubtful advantage — of a distinction between "judicial" and "quasi-judicial" proceedings. Voet[3] wrote of "petty judges" and "superior judges" and it seems that much of what we term quasi-judicial would have been matter for a superior judge of Voet's day.

The basic common law principle is wide: all litigants are entitled to a manifestly fair and impartial hearing of their cases. Thus it is artificial to confine the common law power of review to proceedings before a "quasi-judicial or administrative" body, and, it is submitted, this power extends to proceedings before what is today termed an "inferior court of justice": the two powers are indivisible under the common law. Accordingly, section 31 (1) of the High Court Act does no more than articulate a common law power (and without distinction between tribunals and inferior courts of justice).

Assuming, then, that the General Division's power of review is not merely statutory but based on a wider common law power, does the common law power of review go beyond tribunals and inferior courts: i.e. to the High Court? Here again there is difficulty in tracing a common law power to support any submission made in this regard. Whilst all authoritative texts are to be treated with the utmost caution in view of the differences in the relevant statutes, it is informative to proceed initially by way of analogy.

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[2]*The Common Law of South Africa*, para.2420.
[3]*The Selective Voet* (Gane's translation), Vol. II, pp.48 et seq.

One thing is clear, review of superior court proceedings is not unknown to Southern Africa. Nathan, in treating of the grounds of review, refers[4] to the irregular conduct of a "Judge or magistrate". This, it is submitted, is a significant reference since the structure of the Supreme Court at the time Nathan published his work bears comparison with the present structure of the High Court of Rhodesia. At that time the Cape Supreme Court had the right to review proceedings in the High Court of Griqualand West and in the Eastern Districts Court. Nathan wrote that

> "The Supreme Court of the Transvaal has power to review the proceedings of all inferior courts and to hear appeals from such courts, including Magistrates' courts and the Witwatersrand High Court."[5]

There is, then, an inference that the proceedings of the General Division of the High Court may be subject to review. Palley, however, states quite definitely that there is no review of High Court proceedings, and cites as authority for this proposition (as does Rose Innes) an old Cape case, *Ex parte Scott* (1909) 26 S.C. 520. In that case it was held that there was no statutory provision in the Cape which laid down a procedure whereby the proceedings of the Supreme Court could be reviewed by the same court. Maasdorp J. went little further than an examination of the relevant statute, and dismissed any other possible source of authority in the following sentence:

> "There being no precedent establishing a right of review, I think one can fairly come to the conclusion that there is no right to bring the proceedings of a criminal trial before a judge and jury on review."

It is respectfully submitted that this decision is far from final and conclusive and that it should be treated with caution in view of the scanty treatment given to the possible existence of a non-statutory power. What remains is, to put it at the very least, an inference that High Court proceedings are not immune from review by a superior court, where one exists. Yet a power cannot exist *in vacuo,* so if the General Division is subject to review, the only court which could exercise that power of review is the Appellate Division. So at this stage it is convenient to introduce question (c) posed above and to consider question (b) further in conjunction with it. Thus combined, the inquiry is whether the Appellate Division possesses all common law powers inherent in a superior court, and whether a power to review the proceedings of the General Division may be included in those powers.

Palley expresses the view[6] that the General Division is directly descended from the old High Court as it existed immediately before the passing of the High Court Act in 1964 and from its forerunner, the High Court of

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[4]Op.cit., para.2422.
[5]Op.cit., para.1967
[6]*The Constitutional History and Law of Southern Rhodesia,* pp.521 et. seq.

Matabeleland; accordingly it must possess all the powers inherent in a court of that status. She thus implies that the Appellate Division is a tribunal specially created to hear appeals and as such may only exercise those powers expressly conferred upon it by statute. This view is not in itself unreasonable, but it is not the only possible interpretation.

Both divisions of the High Court are equally creatures of statute, so how can one division — in the absence of an express provision to that effect — be said to possess all the common law powers of a superior court and not the other? It is significant in the light of subsequent constitutional change, that the two divisions were created in 1964 as a result of the gap left by the dissolution of the Federal Supreme Court.[7] The Southern Rhodesian Constitution, as amended, provided that the Appellate Division "shall be a superior court of record, and shall have such jurisdiction and powers as may be conferred upon it by this Constitution and by any law of the Legislature."[8] It did not expressly limit the Court to its statutory powers, and whether this is done by implication is a matter of interpretation: if the Appellate Division is to be regarded as the highest judicial tribunal in Rhodesia, surely it must possess all powers entrusted to the General Division in order that its power may be commensurate with its status. It is submitted that this is a reasonable inference to be drawn from the bald provisions of the statutes.

However, the corresponding provision in respect of the General Division was that it "shall be a superior court of record with full jurisdiction, civil and criminal, over all persons and over all matters within Southern Rhodesia."[9] But is this jurisdiction, together with that conferred on the General Division by section 31 of the High Court Act, exclusive of or supplementary to the jurisdiction of the Appellate Division? Again, if the latter is to be the supreme court in Rhodesia, there is nothing offensive in the idea that it is able to review the General Division, whose decisions it may alter on appeal. This interpretation is supported by the phrasing of the relevant provision in the present Constitution, which vests "the judicial authority of Rhodesia" in the High Court without reference to either division thereof.[10] This leaves the divisions, structure, jurisdiction and procedure of the High Court for definition by another statute; i.e. the original High Court Act as amended,[11] the precise meaning of which is uncertain. If Palley's interpretation is adopted, and the purpose of the High Court Act was to create an Appellate Division with only certain limited, powers, its effect would be to divest that Court of its full "jurisdictional authority". Consequently, such a provision would

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[7]Constitution Amendment Act, 13 of 1964
[8]1961 Constitution, s.52(3).
[9]1961 Constitution, s.52(3).
[10]1969 Constitution, s.62
[11]Amended by Act 57 of 1969.

fall foul of section 76 of the Constitution and would be void. In the absence of express exclusion, it is submitted that the Appellate Division must be regarded as being vested with all common law powers of a superior court.

This submission is very similar to the argument advanced by Beyers K.C. (as he then was) in *R. v. Milne and Erleigh (6),* 1951 (1) S.A. 1 (A.D.). It was argued that the power to review a lower court was inherent in the South African Appellate Division's powers. For if the Appellate Division did not have this power, the highest court in the land would no longer have the power to prevent injustice. Centlivres J.A. said that this was a jurisdiction not conferred by statute; that in this particular case a separate Act of Parliament enabled the accused in a criminl trial to apply for a special entry to be made on the record:

> "Thus it will be seen that the Legislature has made ample provision for enabling the Court of Appeal to set aside a conviction on the ground of an irregularity. As Mr. Williamson, for the Crown, pointed out in his argument, the proceedings by way of a special entry, although called an appeal . . . , are in essence review proceedings. If this Court can assume a jurisdiction in certain cases in order to see that justice is done — a point which may raise considerable difficulty but on which I express no opinion . . . — such an assumption of jurisdiction can only be justified when the Legislature has not provided a remedy".

It is therefore submitted that our Appellate Division may well have power to review the proceedings of the General Division, either under the common law or through the necessity to avoid injustice. As was said above, such a finding must necessarily be far from conclusive. One thing, however, does emerge with clarity, and that is the need for the situation to be clearly defined before our Appellate Division is faced with a question of such delicacy. It is not suggested that the calibre of the present Rhodesia judiciary is such as to warrant a review procedure, but rather that the position in South Africa should be noted in the unlikely event of a similar occurrence here. While the likelihood is not great, it is nonetheless increased by the employment in the General Division of lay assessors who do not always have the same degree of training and protection from undesirable influences as are enjoyed by a judge.

Failure to clarify the law in this field may result in the Appellate Division being obliged to follow the South African practice of resorting to appellate procedure to deal with something which should more properly be dealt with on review.